

Message Text

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ACTION L-03

INFO OCT-01 AF-08 ISO-00 OPIC-03 AID-05 CIAE-00 COME-00

EB-07 FRB-03 INR-07 NSAE-00 USIA-06 TRSE-00 XMB-02

SP-02 CIEP-01 LAB-04 SIL-01 OMB-01 /054 W

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R 141425Z SEP 76

FM AMEMBASSY NAIROBI

TO SECSTATE WASHDC 2519

LIMITED OFFICIAL USE NAIROBI 9965

E.O. 11652: N/A

TAGS: EFIN, OPIC, KE

SUBJECT: TAW TRANSFERS

REF: (A) STATE 186902, (B) NAIROBI 8374

1. ATTORNEY GENERAL'S OFFICE HAS COMPLETED LEGAL OPINION CONCERNING VALIDITY OF TAW LOCAL CURRENCY TRANSFER TO EMBASSY. EMBOFF DISCUSSED SUBSTANCE OF INTERPRETATION WITH SENIOR OFFICIAL OF AG SEPT 13. SINCE AG HAS NOT RECEIVED FORMAL REQUEST FROM FONMIN FOR OPINION AND PREPARED BRIEF MERELY IN RESPONSE TO AMB'S CALL AUGUST 9, EMB UNABLE TO SUBMIT WRITTEN REPLY TO DEPT. CONVERSATION IN AG'S OFFICE, HOWEVER, WAS EXTREMELY HELPFUL IN DETERMINING GIST OF GOK ARGUMENTS.

2. AG CONCLUSION WAS THE IGA DOES NOT RPT NOT RELIEVE EMB AND TAW OF OBLIGATION TO SECURE PRIOR APPROVAL FOR TRANSACTION PER SEC. 7 OF EXCHANGE CONTROL ACT. IN AG OPINION, TERMS OF IGA DID NOT PROVIDE AUTOMATIC EXEMPTION FROM MINISTERIAL APPROVAL NOR CREATE NEW RIGHTS BEYOND RESTRICTIONS IN EXCHANGE CONTROL ACT. (COMMENT: ACCORDING TO AG OFFICIAL, INTERNATIONAL AGREEMENTS ENTERED INTO BY GOK DO NOT BECOME PART OF KENYAN LEGAL CODE UNLESS SPECIFICALLY INCORPORATED BY ACT OF
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PARLIAMENT. GOK-USG IGA WAS NEVER ENACTED IN THIS

FASHION; THEREFORE BINDING AUTHORITY ON SUBJECT OF
CURRENCY TRANSACTIONS IS EXCHANGE CONTROL ACT.)

3. DEPARTING FROM PREPARED BRIEF, AG OFFICIAL OFFERED
HIS PERSONAL OPINION THAT CENTRAL BANK WOULD IN ALL
LIKELIHOOD ACCEDE TO FUTURE USG REQUEST FOR APPROVAL
OF SIMILAR DEPOSIT IF SUBMITTED IN COMPLIANCE WITH
EXCHANGE CONTROL ACT. PROBLEM, THEN, WOULD NOT BE
RECOGNITION OF INVESTOR'S RIGHT TO TRANSFER CURRENCY
PURSUANT TO INVESTMENT GUARANTEE, BUT RATHER THE ISSUE
OF PRIOR ADMINISTRATIVE APPROVAL.

4. AG BRIEF NEVER ADDRESSED QUESTION OF WHETHER OPIC'S
US LOAN GUARANTEES WERE SUFFICIENTLY ENCOMPASSED WITHIN
IGA (PARA 17 OF REFTEL A), BUT RAISED PARENTHETICAL
QUESTION WHETHER TAW'S CASE FELL WITHIN PURVIEW OF IGA
AT ALL. AG WAS APPARENTLY UNABLE TO TRACE EVIDENCE OF
FIRM'S CERTIFICATE OF APPROVED ENTERPRISE. EMBOFF
PROVIDED COPY OF FINMIN LETTER DATED OCTOBER 25, 1971,
IN WHICH MINISTRY INFORMED USAID THAT TAW PROJECT IS
APPROVED. AG OFFICER FELT THIS DOCUMENT WAS SATISFACTORY
PROOF OF GOK APPROVAL AND WILL RETAIN COPY FOR FILES.
WHILE PROOF OF GOK APPROVAL SUPPORTS USG
INTEREST IN TAW CASE UNDER TERMS OF IGA, IT DID NOT
REPEAT NOT PREJUDICE AG OPINION ON SEPARATE QUESTION
OF CURRENCY TRANSFER, WHICH OPINION WAS BASED ON
PREMISE THAT TAW IS IGA-PROTECTED FIRM.

6. PLS ADVISE IF EMB SHOULD SEND FOLLOW-UP REQUEST TO
FONMIN FOR REPLY TO NOTE VERBALE.

DECON 9/14/77.
MARSHALL

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